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# In the Supreme Court of the United States

IBRAHIM MUMID, FADUMO MUSE, FAHMO AHMED, SAFIYA MOHAMED, IFTU JIBRIL, MAYMUNA MUKTAR OSAMAN, MISBAH IBRAHIM, AMAL MOHAMED, SHAMSA ALI MOHAMED, YURUB SIYAD, MUNA MOHAMED, AMINA HARUN, AND MOHAMUD A. MOHAMED,
*Petitioners*,

v.

ABRAHAM LINCOLN HIGH SCHOOL, THE INSTITUTE FOR NEW AMERICANS, SPECIAL SCHOOL DISTRICT NO. 1, AND METROPOLITAN FEDERATION OF ALTERNATIVE SCHOOLS, INC.,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

An important issue of first impression presented by this Petition is whether the Equal Education Opportunity Act (EEOA), 20 U.S.C. § 1703(f), provides a damages remedy. The opposition briefs do not respond meaningfully to this issue.

First, respondents compare the EEOA damages issue to unrelated Rule 60(b)(5) and EEOA interpretive issues of *Horne v. Flores*, 129 S.Ct. 2579 (2009). They further improperly conflate issues of special education law adjudicated by the Minnesota Department of Education (MDE) with claims material to questions presented for review by this Court.

Second, respondents compound errors of fact and law made by the District Court and ratified by the Eighth Circuit by parroting a distorted view of respondents' claims. Respondents contend that petitioners assert only that English language learner (ELL) policy had a disparate impact on immigrant students. In fact, facially discriminatory policies against *foreign-born* students wreaked acute misfortune upon immigrant students, more so for immigrant ELL students.

Third, respondents grant undue weight to the Eighth Circuit's purported findings that the Minneapolis schools' delayed testing policy was not facially discriminatory and that petitioners waived this argument. Based on petitioners' evidence, however, the District Court actually found a facially discriminatory policy, but failed to apply *UAW v. Johnson Controls*, 499 U.S. 187 (1991), due to mixed

errors of law and fact. Petitioners timely appealed this ruling and raised it in the Eighth Circuit.

Fourth, respondents confuse the delayed testing and substandard education claims under both the EEOA and Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and thereby erroneously argue petitioners' alleged lack of standing.

Finally and most egregiously, respondents argue that petitioners' claims are unlike those vindicated in *Johnson Controls*.

Respondents present no valid grounds for denying the Petition. Education is an important issue in this country today. Failure to educate is even more important. The incidence of a failure to educate falls 100 percent on those not educated, and virtually not at all on those responsible for the failure. Congress has passed a statute intended to right this grievous wrong. The statute is not being enforced by the courts, however, to its full and intended effect, when a damages remedy, not expressly excluded by the statute, is denied. It is vital for this Court to consider and decide this question.

## I. The Issues in This Matter Differ Markedly From The Issues in *Flores* and From Those Adjudicated By MDE

*Horne v. Flores* considered whether defendant state and local education agencies should have been granted relief under Federal Rule of Civil Procedure 60(b)(5) from remedial orders following findings that they had violated the EEOA. 129 S.Ct. 2579. These orders required ELL funding increases based on a cost study.

*Flores*, 129 S.Ct. at 2590. The *Flores* decision provided for using Rule 60(b)(5) to limit prophylactic remedies in "institutional reform litigation" (including EEOA cases). 129 S.Ct. at 2593. The Court was concerned that prospective long term, or open-ended, decrees could have "the effect of dictating" state and local policies, depriving elected officials of their powers. 129 S.Ct. at 2593-94. "For these reasons, [this Court held that] a critical question in this Rule 60(b)(5) inquiry [was] whether the objective of the [] declaratory judgment order- *i.e.*, satisfaction of the EEOA's 'appropriate action' standard- ha[d] been achieved." 129 S.Ct. at 2595. In other words, where a "durable remedy" has been implemented prospectively by a District Court after findings of EEOA violations, *Flores* held "continued enforcement of the order [] not only unnecessary, but improper." *Id.*

This case is not *Flores*. Although both *Flores* and this case arise under the EEOA, that is where the similarities stop. The petitioners here seek damages for harms suffered from respondents' violations of the EEOA, precisely because long term prospective equitable remedies are *not* available, petitioners having been allowed to "age out" of the educational system.

Damages under the EEOA are among those "remedies essential to correct particular denials of equal educational opportunity," 20 U.S.C. § 1712, particularly for EEOA plaintiffs who like petitioners cannot continue with their education. The issue of damages for past harm under the EEOA was not squarely before this Court under *Flores*. To interpret the issues of this matter (remedies for past harm) consistently with the limited remedial scheme for

prospective harm contemplated by *Flores*, this Court should allow for the full complement of remedies for past harms. To do otherwise would be to inform those found in violation of the EEOA that they bear no responsibility to victims of their violations once they have excluded them from their school systems.

Respondents mis-cite *Flores* for leaving discretion to local and state education authorities to take "appropriate action" required by the EEOA. *Flores*, however, reviewed only whether Rule 60(b)(5) relief should have been granted in that EEOA action. *Flores* cannot properly be distorted to stand for the proposition that in all EEOA actions, the issue of an "appropriate" remedy is left to the discretion of the violator, as respondents argue.

Similarly, the MDE determinations have no direct bearing on the appropriate remedy in this matter, other than to show the nature of the violations. MDE framed the question addressed in its investigation as follows: "the Complainant alleges that when a student is having difficulties in school, the District does not refer the student for evaluations for special education and related services, but instead, places the student back in an earlier grade." Pet. App. 64a. "School districts must have systems 'designed to identify pupils with disabilities beginning at birth' and attending both public and non-public schools, or not attending any school but who are of school age. Minn. R. 3525.0750." Pet. App. 81a. The MDE looked at whether certain ALHS students, including some petitioners, were denied the benefit of state regulations implementing special education statutes. The MDE order considered only the possibility of compensatory education remedies under the IDEA for

students with identified disabilities. *See* Pet. App. 89a. Petitioners' litigation and the questions presented to this Court relate to relief for national origin discrimination under the EEOA and Title VI (as well as the Minnesota Human Rights Act).

There is simply no *Flores* issue here of deference to local authorities. They have done nothing and can do nothing to remedy the injuries they have inflicted on petitioners other than to compensate them—which is the precise issue presented for this Court's review.

## II. Eighth Circuit Ratified the District Court's Mixed Errors of Law and Fact, Thus Failing to Consider or Apply *Johnson Controls*

Petitioners' second question presented, whether direct evidence of discriminatory intent is required to sustain an action against operators of schools engaged in facially discriminatory practices, Pet. at i, fairly includes all lower court errors of law on this matter. Rule 14.1(a) provides that "any question presented is deemed to comprise every subsidiary question fairly included therein." Hence, this Court necessarily has jurisdiction over any such subsidiary errors. Rule 24.1(a) further allows this Court to consider "plain error[s] not among the questions presented but evident from the record."

The District Court, when applying law to this matter, disregarded and failed to follow *Johnson Controls* by not recognizing that respondents' practices discriminated against immigrant students *on their face*, in that they applied by their very terms only to students of foreign origin. The District Court order

made this issue of law ripe for appeal to the Eighth Circuit.

The Eighth Circuit, when faced squarely with this question (of whether direct evidence is required), sidestepped the question altogether. For delayed testing claims, this holding was based on either waiver or the Eighth Circuit's finding contrary to the District Court that "no policy of the District or ALHS singled out a protected class on its face." Pet. App. 9a-10a. For substandard education claims, the holding was based on either waiver or the lack of a comparator. Pet. App. 9a-11a.

First, the waiver grounds for the Eighth Circuit holding are simply wrong.

Second, the District Court found a facially discriminatory policy for delayed testing, but failed to apply *Johnson Controls*. The District Court found that respondents "had a general policy of refusing to test foreign-born students for special education services until the students had taken three years of ELL classes," Pet. App. 40a. The District Court then made a combined error of law and fact by applying the *McDonnell Douglas* balancing test—without *Johnson Controls*' modifications to *McDonnell Douglas* for facially discriminatory policies—as though the delayed testing claim were a disparate impact claim. It assuredly was not. Petitioners timely appealed this error, which the Eighth Circuit ratified. The issue is therefore ripe for review in this Court and has not been waived.

Finally, the substandard education claims were denied on grounds of lacking a comparator through

which to prove intent. Because the policies at issue were discriminatory on their face, however, *Johnson Controls* allowed intent to be inferred without the necessity of a comparator. It was error for the Eighth Circuit not to recognize this.

These errors are clearly within the second question presented for review by the Petition.

## CONCLUSION

For the foregoing reasons, review should be granted. The rulings below leave petitioners in the position of having shown egregious violations of their rights under federal and state law having life-long and life-altering consequences, for which they are left with no remedy under decisions resting on only a determination of Congressional intent by implication, although Congress has never said anything that remotely supports that conclusion, and such a conclusion offends traditional notions of fair play and substantial justice.

Respectfully submitted,

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